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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION	No. 4:14-md-02541 CW No. 14-cv-02758 CW **NOTICE OF MOTION AND MOTION TO DISMISS *JENKINS v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.*, Case No. 14-cv-02758**
THIS DOCUMENT RELATES TO: ALL ACTIONS	Date: May 14, 2019 Time: 2:30 p.m. Judge: Hon. Claudia Wilken

NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 14, 2019, at 2:30 p.m., in the courtroom of the Honorable Claudia Wilken of the United States District Court of the Northern District of California, located at 1301 Clay Street, Courtroom 6, Second Floor, Oakland, CA 94612, Defendants will and hereby do move the Court for an order dismissing *Jenkins v. National Collegiate Athletic Association, et al.*, Case No. 4:14-cv-02758.

This motion is based on this notice of motion, the accompanying memorandum of points and authorities, the declaration in support of the motion, argument by counsel at the hearing before this Court, any papers filed in reply, any evidence as may be presented at the hearing on this motion, and all papers and records on file in this matter.

Pursuant to this Court's May 19, 2019 Order, any opposition to this motion are due by April 23, 2019 and any replies are due by April 30, 2019. *See* Dkt. 1165.

PRELIMINARY STATEMENT

Defendants respectfully submit this motion at the request of the Court on the subject of how the Court should proceed with respect to *Jenkins v. National Collegiate Athletic Association, et al.*, Case No. 4:14-cv-02758 ("*Jenkins*"). *See* Dkt. 1165. Judgment having been entered in *National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 4:14-md-02541 (the "Consolidated Action")—an action which entirely subsumes the classes and claims asserted in *Jenkins*—all of the individual and class claims asserted in *Jenkins* are now barred by operation of the doctrine of *res judicata*. As a result, there is no way to proceed with the *Jenkins* matter, no reason to stay that action (as Plaintiffs propose), and nothing left to do but dismiss the case, with prejudice.

The core principles of the doctrine of *res judicata* are well settled. Preclusion of other, duplicative claims is required where, as here, there exists (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties. There can be no debate that each of these elements is met with respect to the Consolidated Action and the *Jenkins* action. Plaintiffs' claims in *Jenkins* are identical to those asserted in the Consolidated Action, which were fully adjudicated before this Court: both assert that the Sherman Act invalidates NCAA Division I rules that restrict member schools from compensating student-athletes in excess of grant-in-aid. This Court's decision rendered in the Consolidated Action is now final and binding for the purposes of preclusion, regardless of Defendants' pending appeal to the Ninth Circuit. Finally, privity between the parties clearly exists because each of the parties in *Jenkins*—Fed. R. Civ. P. 23(b)(2) classes of NCAA Division I football and mens' basketball players, the NCAA and five of the athletic conferences named in the Consolidated Action—were parties to the Consolidated Action. Indeed, the non-opt out classes of athletes that the Court certified in *Jenkins* were deliberately defined to be identical to two of the three non-opt out classes certified in the Consolidated Action. Because the three requirements for preclusion irrefutably are met, the doctrine of *res judicata* operates to extinguish the plaintiffs' claims in *Jenkins*.

This Court has jurisdiction over *Jenkins* pursuant to 28 U.S.C. § 1407, and the authority to dismiss it. This Court assumed exclusive jurisdiction over all pre-trial proceedings in *Jenkins* following transfer by the JPML in 2014 (Dkt. 1), and retains jurisdiction until the matter is expressly remanded to the transferor court. This Court has sole authority to rule on all pre-trial matters in *Jenkins*, including this motion to dismiss. Plaintiffs persuaded the Court to certify identical classes in *Jenkins* and then to proceed to trial in the Consolidated Action. Under clear and controlling law, entry of judgment in the Consolidated Action precludes the duplicative claims of the identical Plaintiffs in *Jenkins*. Continuing to stay *Jenkins* serves no legitimate purpose, and it should be dismissed.

BACKGROUND

In March 2014, Shawne Alston filed suit in California alleging that Defendants had agreed to cap compensation and benefits for certain NCAA Division I athletes in violation of the Sherman Act. Case No. 14-cv-01011, Dkt. 1. Martin Jenkins subsequently filed a suit in New Jersey also complaining that the same conduct violated the Sherman Act. Case No. 14-cv-02758, Dkt. 1. Due to the similarity between *Alston* and *Jenkins*, the cases went before the JPML, which transferred *Jenkins* to this Court for coordinated pretrial proceedings in June 2014. Dkt. 1. Several tagalong suits complaining of the same conduct were either filed as an initial matter in this District or transferred by the JPML to this Court. *See*, *e.g.*, Case Nos. 14-cv-01777, 14-cv-02390, & Dkts. 2, 80.

In July 2014, all plaintiffs except those in *Jenkins* joined in the filing of a Consolidated Amended Complaint.[1] The consolidated plaintiffs styled the alleged violation of § 1 of the Sherman Act as four separate claims for relief, asserting several alternative theories under § 1 as separate claims. Dkt. 60. The operative *Jenkins* complaint, which is a Second Amended Complaint filed in 2015, asserts a single cause of action: "Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1," based on an "anticompetitive, horizontal agreement among competitors" and "an unlawful group boycott" which purportedly constitute (1) a *per se* violation of the Sherman Act, (2) a violation of the Sherman Act under a "quick-look" rule of reason analysis, and (3) a violation of

[1] Numerous copycat actions also were filed after the initial Consolidated Amended Complaint and later incorporated by stipulation. Dkts. 86, 184, 187.

the Sherman Act under a full rule of reason analysis. Dkt. 194. The single cause of action asserted in *Jenkins* duplicates the injunctive relief claims tried in the Consolidated Action.

In November 2014, the plaintiffs in both *Jenkins* and in the Consolidated Action filed a Joint Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(2). At the October 1, 2015 hearing on the motion, the plaintiffs suggested that the Court certify the classes as parallel, identical classes for the purposes of consistency. In granting the motion for Rule 23(b)(2) class certification on December 4, 2015, the Court explicitly adopted Plaintiffs' suggestion to "revise[] [the] class definitions for consistency between the two actions." Dkt. 154 at 3. As a result, the Court certified the following three classes in the Consolidated Action:

> "Division I FBS Football Class: Any and all NCAA Division I Football Bowl Subdivision ("FBS") football players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid.
>
> Division I Men's Basketball Class: Any and all NCAA Division I men's basketball players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid.
>
> Division I Women's Basketball Class: Any and all NCAA Division I women's basketball players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid."

Id. at 5. The Court simultaneously granted *Jenkins'* request to "represent two classes, identical to the first two of Consolidated Plaintiffs' proposed classes." *Id*. at 4. Certification of the identical *Jenkins* classes proceeded over Defendants' objections that *Jenkins*, as the later filed action, was improperly duplicative, with classes completely encompassed within the Consolidated Action, and should be dismissed. The actions proceeded in parallel with the explicit understanding that Plaintiffs would select only one action to proceed to trial. *Id*. at 30.

In certifying both proposed classes over Defendants' concerns that the matters were duplicative, this Court explicitly recognized that "[d]uplication at trial can be mitigated by staying one

action while the other proceeds to trial. The first ruling may create a collateral estoppel or *res judicata* effect." *Id*. at 30. Following the conclusion of discovery, Plaintiffs proposed staying *Jenkins* pending the trial and decision in the Consolidated Action. Dkt. 380. At the May 22, 2018 trial planning conference, Plaintiffs' counsel disclosed that they had reached an agreement that *Jenkins* counsel would act as co-lead counsel in the Consolidated Action[2], and that named plaintiffs in *Jenkins* would be called as witnesses in the Consolidated Action. *Id*. at 11:9-12:3. In a minute order entered that same day, the court granted Plaintiffs' request to stay *Jenkins*. Dkt. 381.

The Consolidated Action proceeded to a ten-day bench trial that commenced on September 4 and concluded on September 25, 2018, with closing arguments held December 18, 2018. Dkts. 1028, 1064, 1152. Lead counsel for the *Jenkins* plaintiffs, Jeffrey Kessler, served as co-lead counsel in the trial of the Consolidated Action. *Id*. Additionally, on September 7, 2018, Martin Jenkins, name plaintiff in *Jenkins*, testified as a witness for the plaintiffs in the Consolidated Action. Dkt. 1037. The Court issued a Permanent Injunction and Findings of Fact and Conclusions of Law on March 8, 2019, and entered final judgment on March 12, 2019, fully adjudicating Plaintiffs' causes of action under the Sherman Act. Dkts. 1162-1164.

On March 20, 2019, pursuant to this Court's March 19 Order, counsel for the parties met and conferred regarding "how the Court should proceed" with respect to *Jenkins* in light of the Court's entry of judgment in the Consolidated Action. *See* Dkt. 1165; April 9, 2019 Declaration of Scott P. Cooper ("Cooper Decl.") ¶ 2. Plaintiffs suggested that *Jenkins* remain stayed while "the dust settles," but offered no legal support for that position. *Id*. ¶ 3. On March 27, 2019, Defendants followed up, reiterating that controlling law requires the dismissal of *Jenkins* (regardless of the pendency of appeal), and requesting that Plaintiffs present any legal authority supporting their position that the case should continue to be stayed. *Id*. ¶ 4. Plaintiffs refused to stipulate to dismissal and declined to provide any authority supporting their position. *Id*. ¶ 5 & Ex. A.

[2] *See* May 22, 2018 Case Management Conference Tr. 10:12-11:7 (noting that all counsel would "combine their efforts on both cases while the two cases proceeded simultaneously").

ARGUMENT

I. Because the Consolidated Action Has Been Fully Adjudicated and Completely Subsumes the *Jenkins* Claims and Parties, *Res Judicata* Requires Dismissal

Jenkins' claims are unquestionably barred by the doctrine of *res judicata*, which requires preclusion of duplicative claims where there exists "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077-84 (9th Cir. 2003) (holding the plaintiffs' claims barred by *res judicata* where (1) there was an identity of claims arising from the "same transactional nucleus of facts," (2) the prior action was resolved by a final judgment on the merits, and (3) several parties were identical in both actions, and "therefore quite obviously in privity," while others had a "sufficient commonality of interest"); *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, No. CIV.A. 11-4429 JLL, 2012 WL 1574301, at *15 (D.N.J. May 3, 2012), *aff'd*, 525 F. App'x 94 (3d Cir. 2013) (precluding a class member from pursuing claims already adjudicated). "There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("Basic principles of *res judicata* (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply.").

A. The Claims in *Jenkins* and the Consolidated Action Are Identical

Courts typically apply a four factor test to decide whether there is an identity of claims: "(1) whether rights or interests established in the prior judgement would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *See Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (citing *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1150 (9th Cir. 2011)). The fourth factor is the key criterion. *Id*. All are present here.

The operative complaints make plain that both *Jenkins* and the Consolidated Action assert the same violations of the same statute (the Sherman Act) on the basis of the same alleged conduct—fixing NCAA Division I athletes' compensation and benefits at grant-in-aid. *Compare* Dkt. 194

¶¶ 117-121 *with* Dkt. 60 ¶¶ 512-559.[3] Thus, the Consolidated Action and *Jenkins* presented identical legal claims and theories. Each of these claims was fully litigated in the trial of the Consolidated Action. Even if the pleadings left any question about the identity of claims, which they do not, the trial in the Consolidated Action removes any doubt as to the actions' identity. Not only did *Jenkins* class counsel serve as co-lead counsel in the Consolidated Action, but Mr. Jenkins himself testified as a plaintiff at trial, clearly establishing that the actions rest on the same evidence.

Further, in their recent motion for attorneys' fees, *Jenkins* class counsel seek the lion's share of the $44,917,341.30 request for fees, including for work dating back to the filing of *Jenkins* which necessarily includes work performed solely in the *Jenkins* action. Notice of Motion and Motion for Attorneys' Fees, Expenses, and Service Awards (Dkt. 1169). Indeed, *Jenkins* class counsel explicitly stated in the May 22, 2018 Case Management Conference that *Jenkins* counsel and consolidated plaintiffs' counsel would "combine their efforts on both cases while the two cases proceeded simultaneously." May 22, 2018 Case Management Conference Tr. 10:12-11:7. Having represented to the Court that counsel would combine work on the two matters, and having requested from Defendants attorneys' fees for work performed in the *Jenkins* action in their motion for attorneys' fees following final adjudication of the Consolidated Action, plaintiffs cannot now credibly assert that the matters present distinct claims.

Because the Sherman Act claims in *Jenkins* are entirely subsumed by the Consolidated Action, the *Jenkins* plaintiffs "cannot now relitigate those claims." *Dosier v. Miami Valley Broad. Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (holding that class member could not relitigate claims asserted in the previous class action).

B. <u>The Consolidated Action Concluded in a Final Judgment on the Merits</u>

This Court reached a final determination on the merits in the Consolidated Action on March 8, 2019 (Dkts. 1162-63) and entered that judgment on March 12, 2019 (Dkt. 1164). This Court's Findings of Fact and Conclusions of Law fully disposed of the consolidated plaintiffs' claims regarding the NCAA's alleged violations of the Sherman Act, holding that the NCAA's restrictions

[3] The Consolidated Action initially asserted a state law claim against the NCAA and Pac-12 Conference, but plaintiffs conceded the claim was deficient. October 9, 2014 Argument Tr. 21:15-25.

constituted an impermissible restraint on trade, and finding a less-restrictive alternative to the NCAA's and conferences' rules. Dkt. 1162. The Court issued a permanent injunction pursuant to its Findings of Fact and Conclusions of Law, permanently restraining and enjoining Defendants from enforcing certain restrictions on compensation and benefits, effective 90 days from the date of the order. Dkt. 1163. There can be no dispute that the Findings of Fact and Conclusions of Law and entry of Judgment in a Civil Case constitute a final judgment on the merits in the Consolidated Action.

Plaintiffs' recent proposal to continue staying *Jenkins* "until the dust settles" (Cooper Decl. ¶ 3) suggests Plaintiffs doubt the preclusive effect of an appealed judgment. That position has no merit. "The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal . . . ." *Tripati v. Henman*, 857 F.2d 1366, 1367 (9th Cir. 1988); *see also Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882-83 (9th Cir. 2007) ("[A] final judgment retains its collateral estoppel effect [] while pending appeal" and "the benefits of giving a judgment preclusive effect pending appeal outweigh any risks of a later reversal of that judgment."). The reasoning in *Tripati* is instructive:

> To deny preclusion in these circumstances would lead to an absurd result: Litigants would be able to refile identical cases while appeals are pending, enmeshing their opponents and the court system in tangles of duplicative litigation.

857 F.2d at 1367. The same logic applies here. Denying the Consolidated Action preclusive effect while the appeal is pending would improperly "enable [the *Jenkins* plaintiffs] to simultaneously maintain two identical claims in the same district court." *Id.*

Indeed, plaintiffs tacitly admitted that the Consolidated Action has concluded in a final judgment on the merits by filing a Bill of Costs and Motion for Attorneys' Fees, Expenses, and Service Awards on March 26, 2019, four days after the Defendants filed their Notice of Appeal, and refused to agree to stay that motion pending a decision on appeal. In light of the well-settled rule in the Ninth Circuit that a pending appeal has no effect on the preclusive consequences of a final judgment, the second element for *res judicata* is clearly met.

C. The Parties in *Jenkins* Are All Parties in the Consolidated Action

There is no question that the parties in the two actions are in privity. The Defendants in the

Jenkins action were all defendants in the Consolidated Action. Moreover, every *Jenkins* plaintiff is a member of a class this Court certified in the Consolidated Action. Where a plaintiff falls within the class definition of a previously litigated class action, that plaintiff is clearly in privity with the parties in the previous action. *Dosier*, 656 F.2d at 1298 (plaintiff bound under *res judicata* by prior class action where he fell within the class definition; due process only requires that absent class members' interests be adequately represented in 23(b)(2) class action); *Tahoe-Sierra*, 322 F.3d at 1081 (parties which are identical in both actions are "quite obviously in privity," though a "sufficient commonality of interest" is adequate for establishing privity for purposes of *res judicata*).

Here, the two *Jenkins* classes were identical to two of the three Consolidated Action classes. Plaintiffs in both *Jenkins* and in the Consolidated Action filed a Joint Motion for Class Certification pursuant to Fed. R. Civ. P. 23(b)(2) in November 2014. In its Order Granting the Joint Motion for Rule 23(b)(2) Class Certification, this Court intentionally accepted the plaintiffs' proposed revised class definitions, crafting the classes in *Jenkins* and the Consolidated Action to be identical to ensure "consistency between the two actions." Dkt. 154 at 4. Despite Defendants' objection that such a structure resulted in impermissibly duplicative litigation, the Court granted *Jenkins'* request to "represent two classes, identical to the first two of Consolidated Plaintiffs' proposed classes." *Id*. at 4. No *Jenkins* plaintiff opted out of the Consolidated Action (nor could they, by the very nature of a (b)(2) injunctive class), and accordingly all were members of the classes represented in the Consolidated Action. Furthermore, there can be no dispute that the *Jenkins* plaintiffs' interests were adequately represented in the Consolidated Action, as *Jenkins* class counsel served as co-lead counsel in the consolidated trial, and Mr. Jenkins himself testified as a class member. Because both the plaintiffs and this Court have acknowledged, and in fact intentionally designed, that the classes in the two actions be identical, there is privity between the parties.

II. This Court Has Jurisdiction to Dismiss *Jenkins*

This Court has jurisdiction to determine all pre-trial issues as to *Jenkins*, including the disposal of the matter. The multidistrict litigation rules empower this Court to make pretrial orders "that the transferor court might have made in the absence of transfer[,]" including "authority to de-

cide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, and motions for judgment pursuant to a settlement." *Allen v. Bayer Corp*. (*In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*), 460 F.3d 1217, 1230–31 (9th Cir. 2006); *see also* 28 U.S.C. § 1407(b) (authorizing the transferee judge to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions"); *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig*., 7 F.3d 357, 367 (3d Cir. 1993) (holding "§ 1407 empowers transferee courts to enter a dispositive pre-trial order terminating a case"). Once an action has been transferred by the JPML to the transferee court, the action "remains [t]here until expressly remanded." *In re Ivan F. Boesky Sec. Litig*., 170 B.R. 61, 62 (S.D.N.Y. 1994) (holding that the transferee court maintains exclusive jurisdiction following transfer until expressly remanded).

This Court assumed exclusive jurisdiction over all pre-trial proceedings in *Jenkins* in June 2014, when the JPML transferred the matter to this Court for coordinated pretrial proceedings, and retains jurisdiction until the matter is expressly remanded to the transferor court. This Court retains sole authority to rule on all pre-trial matters, including the instant motion, and has the responsibility to dismiss *Jenkins* as a consequence of reaching a final adjudication in the identical Consolidated Action.

CONCLUSION

For the foregoing reasons, the Court should dismiss *Jenkins v. National Collegiate Athletic Association, et al*, Case No. 4:14-cv-02758, with prejudice.

Dated: April 9, 2019

Respectfully submitted,

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FILER'S ATTESTATION

I, Scott P. Cooper, am the ECF user whose identification and password are being used to file the foregoing document. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Scott P. Cooper